

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**ERRATA CORRECTING THE STATE OF OKLAHOMA'S RESPONSE TO
DEFENDANTS' JOINT MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF
DEFENDANTS' ALLEGED WASTE WATER TREATMENT PLANT
DISCHARGES AND
INTEGRATED BRIEF IN SUPPORT [DKT #2421]**

The State of Oklahoma ("the State") hereby submits this response in opposition to Defendants' Joint Motion *in Limine* To Exclude Evidence of Defendants' Alleged Waste Water Treatment Plant Discharges (Dkt. #2421) ("Defendants' Motion"). The Court should deny Defendants' Motion.

Introduction

The State, from the start of this litigation, has maintained that the waters of the Illinois River Watershed ("IRW") have been degraded as a result of the over-application of poultry waste within the IRW. In response Defendants have disclaimed their responsibility for any pollution in the IRW. Instead they have argued that many sources other than poultry waste are to blame for the pervasive phosphorus pollution in the IRW. *See, e.g.*, DKT #2421, p. 4 (citing Defendants' experts who claim that waste water treatment plants represent the highest contribution of phosphorus to the IRW). The State in order to prove its case hired several experts charged with examining potential sources of phosphorus in the IRW. Dr. Bernard Engel was retained by the State and undertook an

analysis of many potential sources of phosphorus to the IRW. During his analysis Dr. Engel concluded that Waste Water Treatment Plant (WWTP) discharges, while not rising to the level of poultry waste applications, are a contributor to the phosphorus levels of the IRW. *See* DKT #2421, Ex. A, at 28-31, Table 6.4 (Engel Report). Further, in the interest of producing a thorough and accurate report, Dr. Engel analyzed the source inputs to the WWTPs in the IRW and concluded that Defendants contribute phosphorus to these WWTPs when they discharge into them. *Id.* In May 2009, Defendants filed a *Daubert* motion to exclude the testimony of Dr. Engel. *See* DKT #2056. This Court denied that motion in part and ruled that Dr. Engel's scientific opinions regarding the IRW were relevant and reliable. DKT #2387. Defendants now seek to exclude any testimony reflecting their contribution to WWTPs within the IRW on the grounds of relevance and undue prejudice. Neither of Defendants' arguments holds merit, and evidence concerning the Defendants' contribution to WWTPs should be admitted.

Argument

A. Legal Standard

To begin it is important to note the standard for granting a motion *in limine*. When a federal court examines a motion *in limine*, the considered evidence "should be excluded . . . only when the evidence is *clearly* inadmissible on *all* potential grounds." *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993) (emphasis added). It cannot be successfully argued that the State's evidence, in this instance, is inadmissible on *all* potential grounds. Thus, the State's evidence regarding the constituents of WWTP discharges must be admitted. In this case the State's evidence concerning the make-up of discharges from WWTPs in the IRW is

relevant under Federal Rule of Evidence 401. Further, the State's evidence concerning the make-up of discharges from WWTPs in the IRW is more probative to the resolution of this action than prejudicial to Defendants; thus, the evidence should be admitted.

B. Defendants' Rule 401/402 Objection

Rule 401 states in pertinent part:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401. Dr. Engel's report is relevant, reliable and evidence of thorough and objective science. The State has complained that phosphorus from land-applied poultry litter has caused and continues to pollute the waters of the IRW. *See* DKT #1215. Defendants, in their Motion, admit that WWTP phosphorus discharges will be a principal component of their argument that the State cannot prove poultry waste applied to fields affects phosphorus levels in the IRW. *See* DKT #2421, p. 6. If Defendants make this argument, the State must have a chance to address, analyze and explain what the WWTP discharges represent -- including the fact that Defendants are a contributor to the phosphorus contained in these WWTP discharges. Put another way, the State in executing its proof should be able to examine potential sources other than land application and explain what they are and how and why they contribute. Since this evidence tends to make a relevant fact, namely the contribution of phosphorus from poultry waste land application versus alternative sources more likely, it is relevant and should be admitted.

C. Defendants' Rule 403 Objection

Rule 403 States in pertinent part:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. A holding of inadmissibility under Rule 403 is considered an extreme action by the court because in rendering this evidence inadmissible it would be excluding evidence that is relevant. Indeed federal courts, including the Tenth Circuit, have held that determinations of inadmissibility under Rule 403 should be used sparingly. *See World Wide Ass'n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132 (10th Cir. 2006); *United States v. Tan*, 254 F.3d 1204, 1211 (10th Cir. 2001); *see also U.S. v. Morris*, 79 F.3d 409 (5th Cir. 1996) (Because rule providing for exclusion of evidence on ground that its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading jury requires exclusion of relevant evidence, it is extraordinary measure that should be used sparingly.); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1986); *U.S. v. Cole*, 755 F.2d 748 (11th Cir. 1985); *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), *rehearing denied* 693 F.2d 135, *certiorari denied* 460 U.S. 1083 *on remand* 613 F. Supp. 1428; *Kehm v. Procter & Gamble Co.*, 580 F.Supp. 890 (N.D.Iowa 1982).

“In performing the 403 balancing, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.” *World Wide Ass'n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132 (10th Cir. 2006) *citing Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1274 (10th Cir. 2000).

Defendants must successfully show that the **prejudice is unfair** and the danger of such unfair prejudice **substantially outweighs the probative value** of the evidence. Defendants argue that any evidence pertaining to their contribution to WWTPs is not probative and is unduly prejudicial only because the State has not alleged that this is wrong doing. *See* DKT #2421, at 6-7. While the State does not intend to affix liability on Defendants on the basis of their phosphorus contributions to WWTPs, the State is entitled to answer Defendants' likely argument that WWTPs are the major contributor of phosphorus to the IRW. In answering Defendants' argument it is important to fully inform the trier of fact as to the circumstances under which WWTPs add phosphorus to the IRW. Furthermore, any prejudicial effect against the Defendant does not outweigh the probative value of these facts to the State's case. As noted above, such evidence is essential to the State's analysis of potentially alternative sources of phosphorus.

Lastly, Defendants argue that Rule 403 also serves to exclude introduction of evidence relating to the constituents of WWTP discharges because of its risk of confusing the jury or unduly delaying the case. Once again, to succeed on such claims, Defendants must show that the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. As discussed, Defendants have not successfully shown that the probative value of the evidence is substantially outweighed by the factors favoring exclusion. Moreover, there is no reason to believe that discussion of the constituents of WWTP discharges in the IRW will actually confuse the issues, mislead the jury, unduly delay the trial, waste time, or be needlessly cumulative.

Because the discussion concerning alternative sources of phosphorus and the relative contributions of WWTPs and land application of poultry waste is an important part of both the State's and Defendants' cases, the trial will not be "unduly" delayed and this issue will not result in a "mini-trial." *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987) ("it may be an abuse of the trial court's discretion to exclude probative, non-cumulative evidence simply because its introduction will cause delay"). In fact, the discussion of these facts is imperative for both the State and Defendants.

Conclusion

In light of the foregoing, Defendants' Motion should be denied.

Respectfully Submitted,

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I hereby certify that on this 21 day of August, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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